No. 11098

In the United States Circuit Court of Appeals for the Ninth Circuit

Stella Wheeler Bishop, petitioner

v.

Commissioner of Internal Revenue, respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
HELEN R. CARLOSS,
HILBERT P. ZARKY,
Special Assistants to the Attorney General.

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COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court and the dissenting opinion (R. 27–39) are reported at 4 T. C. 588.

JURISDICTION

The petition for review (R. 43–47) involves federal income taxes for the calendar year 1940 in the amount of $1,070.23. The notice of deficiency was mailed to the taxpayer on February 29, 1944. (R. 12–16.) The taxpayer filed a petition for redetermination with the Tax Court on April 20, 1944, under the provisions of Section 272 of the Internal Revenue Code. (R. 1, 3–11.) The decision of the Tax Court sustaining the deficiency determination was entered on March 29, 1945. (R. 4.) The case is brought to this Court by a

petition for review filed by the taxpayer on June 18, 1945 (R. 43–47), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTIONS PRESENTED

1. Whether, upon administration of a decedent's estate in California, losses sustained on the disposition of community property are, as held by the Tax Court, deductible in full by the estate or whether one-half may be deducted by the surviving wife (the taxpayer).

2. Whether expenses incurred in connection with the sale of community property and taxes paid with respect to such property are, as held by the Tax Court, deductible in full by the estate or whether one-half may be deducted by the surviving wife (the taxpayer).

3. Whether taxpayer, as held by the Tax Court, must report as her taxable income the full amount of the compensation received by her as executrix of her husband's estate.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 22–25.

STATEMENT

The taxpayer and her husband, Roy N. Bishop, were married in 1907 and remained married until December, 1938, when Roy N. Bishop died. During their marriage, the taxpayer and her husband were domiciled in California. (R. 28.)

After the death of Roy N. Bishop, his will was admitted to probate by the Superior Court for the City and County of San Francisco. The taxpayer and the Crocker First National Bank of San Francisco were appointed as executrix and executor. (R. 28.)

Certain securities, which had been acquired by the taxpayer and her husband during the period 1931-1937 at an aggregate cost of $65,672.52 were sold by the taxpayer and the bank, acting as executrix and executor, at an aggregate loss of $33,686.77. The securities constituted community property of the taxpayer and her husband. (R. 28–29.)

In disposing of the securities the estate paid transfer taxes of $641.48. The estate also paid a tax of $34 on an automobile which constituted community property. (R. 29.)

In 1940, the estate received dividends of $4,299.11 from certain securities and received interest of $132.15 on bonds and bank deposits belonging to the estate. A portion of some of the dividends received were non-taxable. (R. 29.)

During the year 1940 the taxpayer received a fee of $1,928.09 for her services as executrix of the estate. (R. 29.)

The taxpayer, in her income tax return for 1940, claimed a deduction for one-half of the recognizable loss from the sale of the securities and a deduction for one-half of the taxes paid. She reported in her income one-half of the dividends and interest received by the estate and reported only one-half of the fee which she received as executrix. (R. 30.)

In *Rosenberg* v. *Commissioner,* 115 F. 2d 910, this Court decided that, since all the property of the community in California is subject to administration in the estate of the deceased husband, it forms such an integral part of his estate that the entire income therefrom is taxable to the estate as a separate entity. The decedent there died in 1929, and the decedent here in 1938; however, there was no change in the pertinent provisions of the Probate Code during the interim. While the *Rosenberg* case, unlike the present case, involved property acquired by California spouses prior to 1927, we shall show that the 1927 changes in the California law relating to community property did not alter the fundamental concept that, upon dissolution of the community by the death of the husband, all community assets are subject to administration in his estate. We shall also show that the law of California is the same, in all essential respects, as that of Washington where, as determined by this Court in *Commissioner* v. *Larson,* 131 F. 2d 85, income and gains from community property during the administration of the husband's estate are taxable in their entirety to the estate. In this respect, the law of California is also similar to that of Texas; in *Barbour* v. *Commissioner,* 89 F. 2d 474 (C. C. A. 5th), it was likewise held that the gains from community property are taxable to the decedent's estate. The *Rosenberg, Larson* and *Barbour* cases clearly require that the decision of the Tax Court be affirmed.

With respect to community property of California spouses acquired prior to 1927, the wife's interest was a mere expectancy during the continuance of the com-

munity.[1] The adoption in 1927 of Section 161a of the Civil Code of California operated to give her, with respect to subsequently acquired community property, a present, existing and equal interest.[2] Whatever changes may have been effected in the wife's interest during the continuance of the community,[3] it is quite clear that the adoption of Section 161a and its definition of the "interests of the husband and wife in community property during continuance of the marriage relation" did not alter her relationship to the community assets while her husband's estate is in the process of administration. While, except as to income derived from community property acquired prior to the 1927 amendment, the wife may now report one-half of the community income in a separate return during the husband's lifetime,[4] upon dissolution of the community, the executors or administrators of the husband's estate possess, as they always have, the right to administer all community assets (together with his separate property) and are entitled to the income and gains from the community assets as part of his estate.

[1] *United States* v. *Robbins*, 269 U. S. 315; *Spreckels* v. *Spreckels*, 172 Cal. 775, 158 Pac. 537; *Stewart* v. *Stewart*, 199 Cal. 318, 249 Pac. 197.

[2] *Commissioner* v. *Cavanagh*, 125 F. 2d 366 (C. C. A. 9th); *Bank of America etc. Assn.* v. *Mantz*, 4 Cal. 2d 322, 327, 49 P. 2d 279, 281.

[3] See *Grolemund* v. *Cafferata*, 17 Cal. 2d 679, 111 P. 2d 641, certiorari denied, 314 U. S. 612, holding that even during the continuance of the community, the husband's management and control of the property and its liability for his separate debts remained unchanged by Section 161a.

[4] *United States* v. *Malcolm*, 282 U. S. 792; *O'Bryan* v. *Commissioner*, 148 F. 2d 456, 458 (C. C. A. 9th).

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The California law provides that upon the death of the husband, the community property "is subject to his debts and to administration and disposal under the provisions of Division III of this Code * * *."[5] The executor or administrator must file an inventory showing the estate of the decedent that has come into his possession and must specifically demonstrate "what portion of the property is community property and what portion is separate property of the decedent."[6] Under Division III of the Probate Code, "The executor or administrator must take into his possession all the estate of the decedent, real and personnal * * *."[7] It is expressly provided that:

> The executor or administrator is entitled to the possession of all the real and personal property of the decedent, and to receive the rents, issues and profits thereof until the estate is settled or until delivered over by order of the court to the heirs, devisees or legatees.[8]

These statutory provisions antedated the adoption in 1927 of Section 161a of the Civil Code of California.[9] That no legislative change was intended with respect to the administration of community property or the wife's interest therein during the course of administration is especially evident from the fact that the complete statutory scheme which was

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[5] Section 202, California Probate Code, Appendix, *infra*.

[6] Sections 600 and 601, Probate Code, Appendix, *infra*.

[7] Section 571, Probate Code, Appendix, *infra*.

[8] Section 581, Probate Code, Appendix, *infra*.

[9] Sections 1401 and 1402, Civil Code of California (Deering, 1923); Sections 1445, 1452, 1581, California Code of Civil Procedure (Deering, 1923).

in effect prior to 1927 was enacted in 1931, without material change, by the adoption of the Probate Code.[10]

In the *Rosenberg* case, *supra,* this Court made the following observations respecting the administration in California of community property after the husband's death (p. 912):

> Whatever difference may have existed between the rights of heirs in the property of an intestate and the rights of the widow in community property acquired by her husband and herself prior to the year 1927, it is clear that upon the death of the husband their property is subject to administration in the Superior Court sitting in probate. That court not only determines what debts and what expenses of administration are to be paid therefrom but also determines what part of the property of the decedent is community property, when it was acquired, the attributes thereof, and the respective rights of the widow and heirs, devisees or legatees therein. Until the administration of the estate it cannot be determined authoritatively by any other courts what property is and what property is not community property, or how the distribution shall be made. Cal. Probate Code, Deering, 1937, §§ 202, 300.

The same conclusions are true respecting the administration of property acquired in community after 1927, the statutory provisions having remained unchanged in this respect. The validity of the view which this

[10] California Statutes (1931), c. 281. The provisions referred to in fn. 9, *supra*, were adopted, without material variation, in Sections 201, 202, 571, 581, 600, and 601 of the Probate Code.

Court took with respect to the law of California is emphasized by recent pronouncements of the California courts:

> The court in probate has always exercised jurisdiction over the interest of the surviving wife in the community property in the course of administration upon the estate of a deceased husband. No one of the powers of the court in probate is more firmly settled or more universally conceded and acted upon than this one.[11]
>
> The probate court unquestionably had jurisdiction to determine what interest appellant had, as surviving wife, in the estate which was being administered and could determine what property, if any, was community property.[12]
>
> It is clear, therefore, that the portion of the community property which belongs to the wife is the one-half which remains after the payment of the husband's debts and the expenses of administration apportioned between the community and separate property in accordance with the value thereof, and this is true even when the husband's share of the community, together with his separate property, is ample to pay those debts and expenses.[13]

The possession by the executor of both the separate and community property of a deceased spouse is exclusive and is immune from collateral inquiry by the surviving spouse, who can only come into possession

[11] *Colden* v. *Costello*, 50 Cal. App. 2d 363, 369, 122 P. 2d 959, 963.

[12] *Estate of Stephenson*, 65 Cal. App. 2d 120, 122–123, 150 P. 2d 222, 223.

[13] *Estate of Coffee*, 19 Cal. 2d 248, 252–253, 120 P. 2d 661, 664.

upon a proper decree of distribution by the Superior Court sitting in probate.[14] It is the probate court which has jurisdiction to determine what property of the deceased spouse was community property,[15] since all community assets are administered as part of the decedent's estate.[16] This has always been the rule in California.[17] It is of prime importance to observe that the California courts do not draw any distinction between property acquired before and property acquired after 1927.[18]

It is also significant to observe that the wife's interest in the community assets during administration is not considered as one adverse to the estate.[19] Thus, in California, the probate court does not possess any jurisdiction to try title to property which is claimed adversely to the decedent's estate; it has been held that the wife's claim to her own separate property constitutes such an adverse claim.[20] Also, the wife's interest in property which she and her husband held in joint tenancy gives her an ownership on his death

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[14] *Parsley* v. *Superior Court*, 40 Cal. App. 2d 446, 104 P. 2d 1073.

[15] *Estate of Stephenson*, *supra*, fn. 12.

[16] *Colden* v. *Costello*, *supra*, fn. 11.

[17] *In re Burdick*, 112 Cal. 387, 44 Pac. 734; *Rosenberg* v. *Commissioner*, 115 F. 2d 910 (C. C. A. 9th).

[18] In *Estate of Stephenson*, *supra* (fns. 12, 15), the property was actually acquired after 1927, yet the court did not deem that of such significance to require specific mention. In *Parsley* v. *Superior Court*, *supra* (fn. 14), and in *Colden* v. *Costello*, *supra* (fns. 11, 16), the dates of the acquisition of the property were considered so immaterial that the opinions do not disclose whether acquisition was before or after 1927.

[19] *Colden* v. *Costello*, *supra*; *In re Burdick*, *supra*, fn. 17.

[20] *Estate of Niccolls*, 164 Cal. 368, 129 Pac. 278; *Barnard* v. *Wilson*, 74 Cal. 512, 5 Pac. 237.

which cannot be administered as part of his estate; her title, which is adverse to the estate and not subject to the jurisdiction of the probate court, can be determined in a collateral proceeding.[21] By contrast, however, stands the wife's interest in the community assets during administration. Since her claim to a share of the community property is not considered adverse to the estate, only the probate court has jurisdiction to decree what is her share of the community assets,[22] and that decree is not subject to collateral attack.[23] Here, too, the California courts have not considered the date of acquisition of the property to be a material factor.

> The Probate Code provides one comprehensive, exclusive method for administration upon the estates of decedents. The proceeding is *in rem* and the jurisdiction of the court is complete over the property of the estate and over all persons claiming interests therein under the decedent, as to all matters involved in a complete and effective administration. The law does not provide an alternative procedure for determining question of heirship in connection with rights of succession or the probate of wills, nor one in which the court has jurisdiction over all heirs and other claimants, both known and unknown. In those respects probate law is unique and exclusive. *The title of a surviving wife to her interest in the community estate rests upon a decree of distribution. Her right as survivor*

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[21] *Tooley* v. *Commissioner*, 121 F. 2d 350, 354–358 (C. C. A. 9th).

[22] *Colden* v. *Costello*, *supra*.

[23] *Estate of Tretheway*, 32 Cal. App. 2d 287, 291, 89 P. 2d 679, 681.

> *of the community is one thing; the decree of distribution which determines and identifies the estate which comes to her by virtue of her right is quite another, and is indispensable as a muniment of her title.*[24] [Italics supplied.]

As a result, it can only be concluded that an executor or administrator in California possesses the identical authority with respect to community assets that were acquired after 1927 as he does with respect to property acquired before that date. Whether acquired before or after 1927, those assets are administered as part of the decedent's estate, they are in the possession of the executor or administrator, and he alone is entitled to the "profits thereof until the estate is settled."[25]

We submit that *Rosenberg* v. *Commissioner, supra,* is indistinguishable and governs the disposition of the present case. The rights of the executors of the deceased in this case with respect to the community assets are exactly the same as those possessed in the *Rosenberg case.* The taxpayer's attempt to avoid the effect of that decision and to distinguish it (Br. 10) on the ground that the property there was acquired prior to 1927 is, accordingly, without merit.

The taxpayer's additional attempt to avoid *Commissioner* v. *Larson, supra,* is equally ineffectual. The *Larson* case is distinguishable, so the taxpayer claims, because in California, unlike Washington, the wife's half of the community property "belongs" to her by statute. (Br. 9.)

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[24] *Colden* v. *Costello*, 50 Cal. App. 2d 363, 370, 122 P. 2d 595, 963.

[25] Section 581, California Probate Code.

The argument that the wife's half of the community property "belongs" to her is based on Section 201 of the Probate Code (Appendix, *infra*). (Br. 9.) That provision, however, was adopted in 1923,[26] not 1927, and did not change the nature of the wife's interest during the existence of the community.[27] As a statute of succession, it was fully applicable to the property of the deceased in the *Rosenberg* case.[28] The fact, however, that half of the property "belonged" to the wife in the *Rosenberg* case did not make the wife liable for the tax on any part of the income from the community property during administration; instead, the estate was held taxable on the full amount. Moreover, it is clear that the *Larson* case cannot be distinguished on this ground for no difference exists between Washington and California law in this respect. Thus, the Washington court, in *In re Coffey's Estate,* 195 Wash. 379, 81 P. 2d 283, 284, stated:

> The interest of the wife in the community estate in this state is not a contingent or expectant interest, but a present, undivided, one-half interest. (Citations omitted.) No new right or interest is generated in the wife by the death of her husband; his death merely affords the occasion for the termination of the husband's interest in the community estate.

The taxpayer also attempts to distinguish the *Larson* case on the ground that in Washington, unlike California, legal title to personal property vests in

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[26] California Statutes (1923), c. 18.

[27] *Hirsch* v. *United States*, 62 F. 2d 128 (C. C. A. 9th).

[28] *Estate of Phillips*, 203 Cal. 106, 263 Pac. 1017.

the administrator. (Br. 8–9.) We do not believe that the *Larson* case was decided on this basis. We believe, rather, that the case was determined on the ground that in Washington, as in California, "the entire community estate, not merely the half interest of the decedent, is subject to administration."[29] It may be noted that part of the income involved in the *Larson* case was rent and that this Court did not attach any significance to the fact that in Washington title to real estate does not vest in the executor or administrator. *In re Peterson's Estate,* 12 Wash. 2nd, 686, 734, 123 P. 2d 733, 754–755.

So far as title to property is concerned, it is clear that in California the executor or administrator never acquires title either to personalty or realty, and that is so regardless of whether it is separate or community property. In California, title passes immediately to the persons entitled to the property, "with a qualified right in the personal representative, who holds it, for the purposes of administration, more like a receiver than like a common-law executor."[30] Even though title passes to the persons ultimately entitled to the property, it does not carry with it the right to immediate possession and enjoyment; that right, instead, is in the executor or administrator while the assets of the estate are being administered.[31]

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[29] 131 F. 2d 85, 87.

[30] *Murphy* v. *Crouse,* 135 Cal. 14, 17, 66 Pac. 971, 972.

[31] *Robertson* v. *Burrell*, 110 Cal. 568, 42 Pac. 1086; *Estate of Piercy*, 168 Cal. 750, 145 Pac. 88; *Burr* v. *Floyd*, 137 Cal. App. 692, 31 P. 2d 402; *Security-First Nat. Bk.* v. *Perrine*, 29 Cal. App. 2d 223, 84 P. 2d 248.

Thus, there is no real difference between Washington and California in this respect. In both states, regardless of where naked legal title reposes, it is the personal representative who is entitled to the possession of and to the income from all of the decedent's estate, including the entire community property during administration.[32]

The *Larson* case clearly cannot be distinguished on the ground that title to part of the assets there was in the administrator, unless it be held that the *Rosenberg* case, where there was no title in the administrator, was decided erroneously, and unless it be held that the rental from the real property, as to which the executor had no title, was erroneously taxed to the estate in the *Larson* case. Also, the cases cannot be distinguished on that ground unless it be held that in California the estate can never be the tax entity, even where separately owned property is being administered, since legal title to such property would never be in the administrator.

It should be apparent, however, that naked legal title is no more the criterion of taxability here than it is in connection with other tax problems.[33] Thus, the administration of community property in Texas, which was considered in *Barbour* v. *Commissioner,* 89

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[32] *Bishop* v. *Locke*, 92 Wash. 90, 158 Pac. 997; *In re Peterson's Estate*, 12 Wash. 2d 686, 123 P. 2d 733; Sec. 1464, Washington Revised Statutes (Remington, 1932). See Section 581, California Probate Code, footnote 8, *supra*, and the California cases cited in footnote 31, *supra*.

[33] Cf. *Helvering* v. *Clifford*, 309 U. S. 331; *Helvering* v. *Hallock*, 309 U. S. 106; *Palmer* v. *Bender*, 287 U. S. 551.

F. 2d 474 (C. C. A. 5th), appears to be substantially the same as that in California; it was there held that gains from the sale of all community property were taxable to the decedent's estate. If the taxpayer should attempt, as was done before the Tax Court, to distinguish the *Barbour* case on the ground that the executor in Texas acts as a trustee of the assets of the estate, the answer is that the same considerations are true in California.[34] Thus, it has been said:

> The administrator, also, is a trustee with well-defined duties, among the first of which is that of collecting the assets of the estate, and paying its just debts after due notice to creditors. The heirs' title is subject to the performance by the administrator of all his trusts, and they finally come into the possession and enjoyment of only such portion of the estate as may remain after the execution of them by the administrator.[35]

This statement of California law may be compared with the law of Texas and the reasons why income is taxable to the decedent's estate, as expressed in *Kuldell* v. *Commissioner,* 69 F. 2d 739, 741 (C. C. A. 5th):

> It is perfectly true that under Texas laws an administrator takes no title to the property, either real or personal; that all of it descends to and vests in the legatees under a will, in the heirs, if there is none. It is equally true, however, that it does so subject to the payment of the debts of the intestate, and that it is

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[34] The dissenting opinion of the Tax Court also attempted to distinguish the *Barbour* case on that ground. (R. 38.)

[35] *Robertson* v. *Burrell,* 110 Cal. 568, 574, 42 Pac. 1086, 1087. Accord: *Burr* v. *Floyd*, *supra*, fn. 31.

> provided that upon the issuance of letters testamentary or administration, the executor or administrator shall have the right to the possession of the estate as it existed at the death of the testator or intestate, and he shall recover possession and hold such estate in trust to be disposed of in accordance with law. It was in recognition of this period of husbandry and control by the administrator, which prudent administration requires, that the Revenue Acts provide that income received by estates during the period of administration or settlement shall be returned and paid by the administrator.

The Board of Tax Appeals has taken a similar view of the matter, holding that, although title to a decedent's property in Oklahoma passes immediately to his heirs, the income during administration is taxable to the estate because the property is subject to administration, and because the right to possession of the assets and the income therefrom is vested in the administrator pending completion of administration.[36]

If important differences do exist between the laws of Washington and California, we submit that the wife has an interest in the community assets which are administered in California which is less than that under Washington law. For, in California, the community estate is liable, together with the husband's separate estate, for a proportionate share of his separate debts and the expenses of administering his estate. This is true even where his separate property

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[36] *Estate of McBirney* v. *Commissioner*, decided June 23, 1942, rehearing denied, September 16, 1942 (1942 P-H B. T. A. Memorandum Decisions, pars. 42,360, 42,509).

is sufficient to pay all his separate debts and administrative expenses.[37] In Washington, however, on the husband's death, the wife's one-half of the community estate is not liable for her husband's separate debts—only his half is so liable.[38] Thus, it is especially true in California that the wife's interest in the community cannot be ascertained until her husband's estate has been completely administered.

We agree with the taxpayer's fundamental premise that "ownership" is the ultimate consideration in determining taxability (Br. 11 *et seq.*); it is submitted, however, that the taxpayer mistakenly identifies "ownership" with legal title. All the important indicia of ownership, i. e., possession, control and the right to income exist in the executors or administrators during administration. Regardless of where legal title exists, ownership lies in the estate during administration.

It can only be concluded that all income from community property in California during administration is taxable to the administrator of the husband's estate and that no part thereof is attributable to the wife until administration has been completed.

It seems fairly obvious that there is no merit in the taxpayer's apparent contention that, even if all the income from the property is taxable to the estate, it should be entitled to deduct only one-half of the

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[37] *Estate of Coffee*, *supra*, fn. 13.

[38] *In re McHugh's Estate*, 165 Wash. 123, 127–128, 4 P. 2d 834, 836; *Kelley* v. *Butler*, 182 Wash. 310, 315, 47 P. 2d 664, 666. See 1 deFuniak, Principles of Community Property (1943), Sec. 212.

losses on the disposition of community property. (Br. 1, 14, 21.) We are aware of no authority, and none has been cited by taxpayer, holding that if gain results from the sale of property, it is taxable to one entity, while if losses result they may be taken by a different tax entity. Yet, in *Commissioner* v. *Larson, supra,* and in *Barbour* v. *Commissioner, supra,* it was held that gains from the sale of community assets were taxable to the estate. The very reasons why the gains were taxable to the estates in those cases would apply with equal force to permit the estate to take the deduction where losses are incurred. Once the community has been dissolved by the death of the husband, it is his estate which, during administration, receives the gain from the sale of community property and, for that reason, the estate alone is taxable for that gain. Similarly, since ownership of the assets lies in the estate during administration, it is the estate which suffers the loss on the sale of such property, and it is the estate alone which is entitled to the deduction for the loss.[39]

We have discussed this case only with respect to the issue of whether the entire loss is deductible by the decedent's estate. If, as we believe, the Tax Court was correct in its holding on this issue, there is no need to extend the discussion to show the validity of its decision on the subordinate issues, namely, whether the expenses of the sale of those assets, including transfer taxes, and a tax paid on an automobile which was community property, were entirely deductible by the

[39] *Anderson* v. *Wilson*, 289 U. S. 20.

estate, and whether the amount of income tax withheld at the source on a tax-free covenant bond owned in community was to be credited in full to the estate.

There is, however, one remaining issue which has been raised by the taxpayer but which is not supported by any extended argument. That issue is whether the taxpayer may exclude from her taxable income one-half of the compensation which she received for her services as executrix to her husband's estate. This issue is wholly unrelated to the other questions raised and we can think of no theory which supports it. The taxpayer cites no provision of the statute which would entitle her to exclude or deduct that amount from her taxable income. Regardless of the fact that the expenses of administration were paid out of community assets of the estate, the money came from a separate tax entity and was paid to her as compensation; therefore, it constitutes gross taxable income under Section 22 (a) of the Internal Revenue Code (Appendix, *infra*).

CONCLUSION

In view of the foregoing, the decision of the Tax Court should be affirmed.

Respectfully submitted.

Samuel O. Clark, Jr.,
Assistant Attorney General.
Sewall Key,
Helen R. Carloss,
Hilbert P. Zarky,
Special Assistants to the Attorney General.

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APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * [26 U. S. C. 1940 ed., Sec. 22.]

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * * *

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). [26 U. S. C. 1940 ed., Sec. 161.]

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same

basis as in the case of an individual, * * *
[26 U. S. C. 1940 ed., Sec. 162.]

* * * * *

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.161–1. *Income of estates and trusts.*—* * *

* * * * *

The income of an estate of a deceased person, as dealt with in the Internal Revenue Code, is therein described as received by the estate during the period of administration or settlement thereof. The period of administration or settlement of the estate is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payments of debts and legacies. It is the time actually required for this purpose, whether longer or shorter, than the period specified in the local statute for the settlement of estates. If an executor, who is also named as trustee, fails to obtain this discharge as executor, the period of administration continues up to the time when the duties of administration are complete and he actually assumes his duties as trustee, whether pursuant to an order of the court or not. No taxable income is realized from the passage of property to the executor or administrator on the death of the decedent, even though it may have appreciated in value since the decedent acquired it. But see sections 42, 43, and 44. As to the taxable gain realized, or the deductible loss sustained, upon the sale or other disposition of property by an administrator, executor, or trustee, and by a legatee, heir, or other beneficiary, see sections 111 and 112. As to capital gains and losses, see section 117. * * *

* * * * *

Probate Code of California (Deering, 1937):

§ 201. *Succession.*—Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code.

* * * * *

§ 202. *Subject to debts, etc.: Death of wife.*—Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division III of this code; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect.

§ 571. *Duties of executor, etc.: Surviving partner.*—The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. * * *

§ 581. *Custody of decedent's property: Interests of, actions by and against, heirs and devisees.*—The executor or administrator is entitled to the possession of all the real and personal property of the decedent, and to receive the rents, issues and profits thereof until the estate is settled or until delivered over by order of the court to the heirs, devisees or legatees. * * *

§ 600. *Inventory and appraisement.*—Within three months after his appointment, or within such further time as the court or judge for reasonable cause may allow, the executor or administrator must file with the clerk of the court an inventory and appraisement of the estate of the decedent which has come to his possession or knowledge together with a copy of the same which copy shall be transmitted by said clerk to the county assessor. * * *

§ 601. *Community and separate property.*—The inventory must show, so far as the same can be ascertained by the executor or administrator, what portion of the property is community property, and what portion is separate property of the decedent.

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